

The UK's New Plan for Immigration: Concerns About Legality and Proportionality

30 April 2021

- The UK's Home Secretary, Priti Patel, has announced a New Plan for Immigration, which seeks to overhaul the immigration system, with a significant focus on targeting "illegal immigration".

"For the first time, whether people enter the UK legally or illegally will have an impact on how their asylum claim progresses, and on their status in the UK if that claim is successful. We will deem their claim as inadmissible, and make every effort to remove those who enter the UK illegally having travelled through a safe country first in which they could and should have claimed asylum." (emphasis added)

New Plan for Immigration, Foreword

- The New Plan for Immigration is open for public consultation until 6 May 2021. Readers can submit comments on the New Plan for Immigration [here](#).
- Some of the proposals are not aligned with international law (which the UK itself has agreed to) and certain of the proposals seem disproportionate: penalising asylum seekers for entering via supposedly "illegal routes", instead of penalizing human traffickers.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

CLEARY PERSONNEL INVOLVED

ABU DHABI

Courtenay Stock
+971 2 412 1715
cstock@cgsh.com

LONDON

Maurits Dolmans
+44 207 614 2335
mdolmans@cgsh.com

Byron Spring
+44 20 7614 2326
bspring@cgsh.com

Kathryn Collar
+44 20 7614 2208
kcollar@cgsh.com

Introduction

On 24 March 2021, the UK's Home Secretary presented the Policy Statement on the UK's New Plan for Immigration (the "New Plan for Immigration") to Parliament, introducing what has been described as "the most significant overhaul of our asylum system in decades".¹ The New Plan for Immigration, which places significant focus on "illegal immigration" and "illegal entry" into the UK, is open for public consultation until Thursday 6 May 2021.

This memorandum takes a closer look at certain of the proposals contained in the New Plan for Immigration and considers them within the wider context of international law and principles on asylum seeking and refugee status.

¹ See [Home Secretary's statement on the New Plan for Immigration](#), 24 March 2021.



The Refugee Convention: General principles

The UK is a signatory to the [1951 Convention Relating to the Status of Refugees](#) and its 1967 Protocol (the “**Refugee Convention**”). This is the foundation of international refugee law and places an obligation on signatory states to protect refugees.

The Refugee Convention defines a refugee as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country”.²

A fundamental principle of international refugee law is that of “*non-refoulement*”, according to which a refugee should not be returned to a country in which they face a threat to their life or freedom.³ This rule of customary international law is codified in the Refugee Convention.

The Refugee Convention also contains provisions protecting refugees who enter or are in a country of refuge unlawfully and provisions relating to the expulsion of refugees.

Background to Proposed Changes

Increased Channel crossings and media interest.

The New Plan for Immigration comes against a backdrop of increasing media interest in those attempting to enter the UK via “*illegal routes*” and in the “*people smugglers*” running the operations.

According to some sources, this is representative of a significant increase in the number of migrants entering the UK in this way, with some reports noting that as many as five times more migrants attempted to cross the English Channel in small boats in the first eight months of 2020 when compared to the same period in 2019.⁴

The New Plan for Immigration states that a record 8,500 people arrived on small boats across the

Channel in 2020.⁵ It notes, though, that other routes declined in 2020, which it attributes to the Covid-19 pandemic.⁶

Yet, interpretations of the statistics vary. The United Nations High Commission for Refugees (the “**UNHCR**”) stated in August 2020 that numbers of Channel crossings “*remain low and manageable*”,⁷ whereas the Home Office says the impact of these statistics on the immigration system in the UK is significant: “*this system is collapsing under the pressures of what are in effect parallel illegal routes to asylum, facilitated by criminals smuggling people into the UK*”⁸ (emphasis added). Indeed, “*the capacity of our asylum system is not unlimited*”.⁹

It is evident that a key driver behind the proposed overhaul of the UK immigration system is to deter individuals from seeking to reach the UK via boat, regardless of their motivations and even when other routes are unavailable.

Changes to Immigration Rules in 2020. On 10 December 2020, the Home Secretary published its [Statement of Changes in Immigration Rules \(HC 1043\)](#), together with an [explanatory memorandum](#). These changes to the Immigration Rules came into effect on 31 December 2020 and paved the way for certain aspects of the proposals that are being put forward in the New Plan for Immigration.

“The changes [...] [allow] us to **treat applicants as inadmissible** based solely on whether they have passed through one or more safe countries in order to come to the UK as a matter of choice. They will allow us to **pursue avenues for their removal** not only to the particular third countries through which the applicant has travelled, but to any safe third country that may agree to receive them.”¹⁰ (emphasis added)

New Plan for Immigration: Key Points

The New Plan for Immigration follows the changes made to the Immigration Rules in December 2020 and

² Refugee Convention, Article 1.A(2).

³ Refugee Convention, Article 33

⁴ See <https://news.sky.com/story/revealed-channel-migrant-crossings-five-times-higher-than-last-year-12047812> and <https://www.statista.com/statistics/1171253/migrant-channel-crossings-in-the-uk/> (both accessed on 29 April 2021).

⁵ New Plan for Immigration, p.7

⁶ Ibid.

⁷ UNHCR, IOM, *Interception at sea is not the solution to channel crossings*, 13 August 2020,

<https://www.unhcr.org/news/press/2020/8/5f3567a84/unhcr-iom-interception-sea-solution-channel-crossings.html> (accessed on 29 April 2021).

⁸ New Plan for Immigration, Foreword, p. 3.

⁹ Ibid.

¹⁰ Explanatory Memorandum to the Statement of Changes in Immigration Rules Presented to Parliament on 10 December 2020 (HC 1043), paragraph 7.4.

proposes (*inter alia*) that asylum applications may be treated as inadmissible if the applicant has travelled through, or has a connection with, a safe third country with which the UK has an agreement.

The principle of fairness

“At the heart of our New Plan for Immigration is a simple principle: fairness. Access to the UK’s asylum system should be based on need, not on the ability to pay people smugglers.”

New Plan for Immigration, Foreword

The New Plan for Immigration distinguishes between those who arrive in the UK via “*illegal routes*” and those who have a “*genuine need*” for asylum.¹¹ It asserts that these routes introduce economic migrants into the asylum system and that this “*inhibits our ability to properly support others in genuine need of protection*”.¹²

The New Plan for Immigration contains nothing by way of supporting evidence for this assertion, and does not address the concern that even refugees with a “*genuine need*” may have no other reasonable choices than an unofficial route. We consider this further at *A fair approach?* below.

Entry through safe and legal routes

“We will continue to encourage asylum via safe and legal routes, strengthening our support by offering an enhanced integration package to those arriving in this manner and immediate indefinite leave to remain in the UK for resettled refugees.”

New Plan for Immigration, Foreword

There are several references in the New Plan for Immigration to the safe and legal routes to the UK, which it says are “*well established*” and will be strengthened.¹³ Routes like resettlement schemes, family reunion and the new pathway to citizenship for British National (Overseas) status holders.

There is no mention, however, that those routes are not available to all those who may be in “*genuine need*” of protection, nor is there any consideration of

whether there are any universally available “*legal*” routes for those in need of protection to reach the UK.

Indeed, as the University of Oxford’s Migration Observatory has pointed out, “*there is no asylum visa, which means that a person seeking asylum must either arrive irregularly or enter on a visa that has been issued for another purpose, such as tourism*”.¹⁴

“Illegal entry” into the UK

“For the first time, whether people enter the UK legally or illegally will have an impact on how their asylum claim progresses, and on their status in the UK if that claim is successful. Anyone who arrives into the UK illegally – where they could reasonably have claimed asylum in another safe country – will be considered inadmissible to the asylum system” (emphasis added)

New Plan for Immigration, Foreword

As mentioned above, the New Plan for Immigration seeks to “*disincentivise individuals from attempting to enter the UK illegally*”¹⁵ by rendering inadmissible to the UK asylum system irregular migrants who have travelled through, or have a connection with, a safe country in which they could have claimed asylum. This can be seen as punishing the refugee for the offence of the human trafficker.

Further measures include: extending the current criminal offence for entering or being in the UK without status or permission to include those “*seeking to enter the UK illegally*”¹⁶ (emphasis added); increasing the maximum sentence for that offence; and increasing the maximum penalty under the Clandestine Entrant Civil Penalty Regime.

The New Plan for Immigration also proposes certain measures directed at those who facilitate entry via “*illegal routes*”. However, it does not appear sufficiently to consider the balance of the situation it seeks to address: the act of travelling to seek international protection (which is permitted under international law) versus the criminal activity of people smuggling. This is discussed in greater detail

¹¹ New Plan for Immigration, Foreword, p.3.

¹² Ibid.

¹³ New Plan for Immigration, pp. 11-12.

¹⁴ See Migration Observatory, *Irregular migration in the UK*, 11 September 2020,

<https://migrationobservatory.ox.ac.uk/resources/briefings/irregular-migration-in-the-uk/> (accessed on 27 April 2021).

¹⁵ New Plan for Immigration, p.17.

¹⁶ New Plan for Immigration, p.37.

at *No penalties for unlawful entry* and *Disrupting people smuggling networks*, below.

The safe third country concept

“If you illegally enter the UK via a safe country in which you could have claimed asylum, you are not seeking refuge from imminent peril - as is the intended purpose of the asylum system - but are picking the UK as a preferred destination over others.”

New Plan for Immigration, Foreword

Under the proposals, an individual who is deemed inadmissible will either be returned to the safe country from which they embarked or sent to another safe third country with which they have a connection. This is “contingent on securing returns agreements” with third countries and “agreements to effect removals to alternative safe third countries.”¹⁷

Temporary protection status

“Those who prevail with claims having entered illegally will receive a new temporary protection status rather than an automatic right to settle, will be regularly reassessed for removal from the UK, will have limited family reunion rights and will have no recourse to public funds except in cases of destitution.”

New Plan for Immigration, Foreword

If an individual cannot be removed to a safe third country, their claim for asylum will be processed. But the maximum protection they will be afforded if successful will be the temporary protection status.

Temporary protection status will last for a period of no longer than 30 months, at which point the individual in question will be reassessed for return to their country of origin or removal to another safe country.

Those with temporary protection status will have no automatic right to settle, restricted rights to family reunion and no recourse to public funds (except in cases of destitution).

¹⁷ New Plan for Immigration, p.19. As of 24 March 2021, no such agreements had been reached and, according to reports on 25 April 2021, France, Germany and Belgium have ruled out entering into bilateral agreements of this nature. (See <https://www.theguardian.com/politics/2021/mar/24/priti-patel->

It is unclear what rights they *will* have. For example, will an individual with temporary protection status have an unrestricted right to work or study?

The potential impact of this is considered at *Facilitating naturalization* and *Housing and public relief*, below.

Consistency with the Refugee Convention

The New Plan for Immigration asserts that its proposals for inadmissibility to the asylum system are consistent with the Refugee Convention.¹⁸

While the principle of “*non-refoulement*” is unlikely to be infringed by these proposals due to the “*safe third country*” concept, there are a number of further questions and areas of potential concern.

No penalties for unlawful entry (Article 31)

A focus of the New Plan for Immigration is the perceived need to deter individuals from seeking to enter the UK via “*illegal routes*”, which it proposes to do by increasing the penalties applicable to those individuals and restricting the rights to which they may have recourse.

How, though, does this align with Article 31 of the Refugee Convention?

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Refugee Convention, Article 31

The Introductory Note to the Refugee Convention highlights as potentially prohibited penalties “*being charged with immigration or criminal offences relating to the seeking of asylum, or being arbitrarily*

[has-not-secured-deals-with-european-countries-over-uk-asylum-overhaul](https://www.independent.co.uk/news/uk/home-news/asylum-eu-deportation-home-office-b1836598.html) and <https://www.independent.co.uk/news/uk/home-news/asylum-eu-deportation-home-office-b1836598.html>, both accessed on 26 April 2021.)

¹⁸ New Plan for Immigration, p.19.

detained purely on the basis of seeking asylum".¹⁹ If applicable also to those who have arrived "*directly*" in the UK for the purpose of seeking asylum, the proposals to increase criminal penalties for unlawful entry would infringe Article 31.

Yet, the New Plan for Immigration does not make clear whether or how it distinguishes between those arriving "*directly*" and those not. Reference is made to those who have passed through other safe countries on their way to the UK, but also to a principle that "[a]nyone who arrives in the UK illegally – where they could reasonably have claimed asylum in another safe country – will be considered inadmissible to the asylum system".²⁰

Without further clarification on the meaning of "*could reasonably have claimed asylum in another safe country*", it is difficult to assess the extent to which the proposals are in line with Article 31.

The Introductory Note to the Refugee Convention also emphasises that the Refugee Convention "*further stipulates that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay. This recognizes that the seeking of asylum can require refugees to breach immigration rules*".²¹ Indeed, the University of Oxford's Migration Observatory has found that "*it is almost impossible for many asylum seekers to reach Europe legally*".²² Similarly, the Refugee Convention does not oblige asylum seekers to apply in the first safe country they encounter. Nor is it always reasonable to require that.

Will a refugee be expected, for example, to claim for asylum in an ostensibly safe country where claim processing is subject to unreasonable delay, likely to be rejected even if in cases of "*genuine need*", they cannot speak the dominant language, have little by

way of job prospects, or find themselves living in overrun camps with poor conditions and little prospect of improvement?²³

And yet the New Plan for Immigration states unequivocally that "[i]t is unacceptable that people seeking to enter our country illegally, including those who have crossed the Channel by small boat, are not appropriately penalised for breaking the law".²⁴

As such, it is difficult to see how the New Plan for Immigration could be considered to be aligned with the spirit of the Refugee Convention, even if the legality of the position is as yet uncertain.

No obligation to stay in first safe country

There is nothing in Article 31, or the Refugee Convention more broadly, to suggest that individuals are obliged to present their asylum claim in the first country reached outside their country of origin.

Indeed, there has been much commentary over the years as to the practicality of such an obligation. According to the University of Oxford's Migration Observatory, most asylum seekers arriving in Europe will do so by land or by sea.²⁵ As such, a "*first safe country*" obligation would likely disproportionately burden the countries at Europe's periphery, while countries such as the UK would take less of the load.

Burden-sharing, international cooperation and solidarity are key elements to the international protection of refugees. Indeed, it was a unanimous recommendation of the United Nations conference at which the Refugee Convention was adopted that "*Governments [...] act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement*".²⁶

¹⁹ Refugee Convention, Introductory Note, p.3.

²⁰ New Plan for Immigration, p.19.

²¹ Refugee Convention, Introductory Note, p.3. This has also been recognised in English case law (e.g., *R v Uxbridge Magistrates' Court and Another, ex parte Admini* [2001] QB 667 at [1-3]: "*The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. [...] The need for Article 31 has not diminished.*")

²² See Migration Observatory, *Calais and clandestine migration into the UK: Concerns and context*, 24 October 2014, <https://migrationobservatory.ox.ac.uk/resources/commentaries/calais-and-clandestine-migration-into-the-uk-concerns-and-context/> (accessed on 26 April 2021).

²³ Spain, for example, reportedly experienced a 900% rise in arrivals in 2020 and has constructed a number of emergency

camps on the Canary Islands in an attempt to cope with the situation. Yet, media reports indicate that the conditions in those camps are poor and unsafe. (See

<https://www.independent.co.uk/news/world/spain-canary-islands-migrants-africa-camps-b1722555.html> and https://english.elpais.com/spanish_news/2021-02-08/tension-spreads-through-migrant-shelters-in-spains-canary-islands.html, both accessed on 27 April 2021.)

²⁴ New Plan for Immigration, p.36.

²⁵ See Migration Observatory, *Calais and clandestine migration into the UK: Concerns and context*, 24 October 2014, <https://migrationobservatory.ox.ac.uk/resources/commentaries/calais-and-clandestine-migration-into-the-uk-concerns-and-context/> (accessed on 26 April 2021).

²⁶ Refugee Convention, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, p.11.

The UNHCR has reported that, in the year to September 2020, the UK received 38,943 asylum seekers, compared to 124,060 in Germany, over 100,000 in each of France and Spain, and almost 59,000 in Greece.²⁷ In practical terms, it is difficult to see how implementing a policy that will skew these statistics even further can be deemed proportionate.

Facilitating naturalization (Article 34)

As explained above, the New Plan for Immigration envisages that those who are granted asylum despite having arrived via an “illegal route” will only receive temporary protection status.

Yet, there is a question as to whether the temporary protection status, with its focus on reaching a stage where the refugee returns to its country of origin, accords with Article 34 of the Refugee Convention.

“The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”

Refugee Convention, Article 34

It is unclear whether an individual with temporary protection status could ever be afforded the right to settle in the UK. There is a risk that individuals with valid claims for asylum may be left in limbo indefinitely. Arguably, if the UK does not afford the right to settle to those who have successfully claimed asylum, it will not be making “every effort to expedite naturalization”.

Housing and public relief (Articles 21 and 23)

Those who receive temporary protection status will have “no recourse to public funds”, except in cases of destitution.²⁸ The effect of this is that such individuals will be precluded from claiming for most benefits, tax credits and housing assistance.

²⁷ Rossella Pagliuchi-Lor, *UNHCR Urges UK to Look at Context as it Approaches Asylum Changes*, 26 November 2020, <https://www.unhcr.org/uk/news/stories/2020/11/5fbfc4e34/unhcr-urges-uk-to-look-at-context-as-it-approaches-asylum-changes.html> (accessed on 29 April 2021).

²⁸ To determine whether a person is destitute, consideration is given to whether they are “able to meet their essential living needs” and/or “able to secure adequate accommodation”. See

Under the current immigration rules, this condition applies to many of those who have been granted limited leave to remain in the UK. In this sense, it is not a new concept. It has however been subject to legal challenge in recent years,²⁹ and there is nonetheless a question as to whether it aligns with the provisions of the Refugee Convention.

“As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

Refugee Convention, Article 21

“The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as it accorded to their nationals.”

Refugee Convention, Article 23

Once an individual has been afforded temporary protection status, they will be “lawfully” present in the UK. Article 23 suggests, therefore, that they should be afforded the same access to housing assistance and other public relief as UK nationals.

Further, as noted above, the New Plan for Immigration does not indicate whether those given temporary protection status will have the right to work or study. (And it is important to remember that a right to work is by no means a guarantee of employment or a living wage.)

Indeed, it is unclear how the temporary protection status could work in practice if individuals, many of whom may have entered the UK with very little by way of personal resources, are expected to maintain and accommodate themselves with no assistance.

The question then arises: is a temporary protection status that requires individuals to reach destitution

Home Office, *Assessing Destitution*, Version 3.0, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/845235/assessing-destitution-v3.0-ext.pdf (accessed on 27 April 2021).

²⁹ See, for example, <https://www.gardencourtchambers.co.uk/news/high-court-legal-challenge-to-no-recourse-to-public-funds-policy> and <https://dpglaw.co.uk/home-office-faces-further-high-court-challenge-to-no-recourse-to-public-funds-policy/> (both accessed on 27 April 2021).

before they are afforded any support in fact a form of protection at all?

Disrupting people smuggling networks

One of the key objectives of the New Plan for Immigration is to “[break] *the business model of people smuggling networks*” by deterring “*illegal entry into the UK*”.³⁰

“Illegal immigration is facilitated by serious organised criminals exploiting people and profiting from human misery. It is counter to our national interest because the same criminal gangs and networks are also responsible for other illicit activity ranging from drug and firearms trafficking, to serious violent crimes. And if left unchecked, illegal immigration puts unsustainable pressures on public services.”

New Plan for Immigration, Foreword

In principle, the proposal to disrupt the criminal networks behind people smuggling must of course be welcomed. To this end, the New Plan for Immigration contains some measures targeted at those facilitating and conducting these operations.

Yet, the above-referenced objective is premised on the position that making the environment for individuals who have entered the UK via “*illegal routes*” more hostile will have the effect of combatting people smuggling. Indeed, as detailed above, many of the measures are in fact aimed at penalising those who enter the UK via routes operated by people smugglers.

Surely, though, the emphasis would be better placed on the criminal networks themselves, rather than those vulnerable to and exploited by them?

The proposals appear to rely on an implication that those arriving in the UK in this way could and should have chosen to seek protection in another country.

But the concept of “*choice*” on the part of an asylum seeker is itself complicated. There may be some choices open to an asylum seeker making the decision to leave their country of origin, and these may be “*shaped by their country of origin, age, gender, socio-economic status and education*”,³¹ by familiarity with

a particular language, or by pre-existing ties with a particular country.

Yet, a 2010 study by the Refugee Council found that the “*single most important reason*” why the asylum seekers participating in the study had ended up in the UK was decisions made by others.³² “*Agents played a very significant role in providing access to travel documents and facilitating the journey.*”³³

If the choice as to the final destination of the individuals the subject of people smuggling in fact lies with the people smugglers, there is a question as to whether the measures proposed in the New Plan for Immigration will deter people smugglers at all. These organisations are unlikely to be concerned by the status of the individuals they traffic once those individuals have reached the destination country.

Indeed, the “*choice*” to arrive via a “*safe and legal route*” is unlikely to be available to a significant proportion of those with “*genuine need*” for protection.

A fair and proportionate approach?

The New Plan for Immigration refers on several occasions to the notion that “*access to the UK’s asylum system should be based on genuine need, not on the ability to enter illegally by paying people smugglers*”.³⁴

Indeed, as we have noted above, the New Plan for Immigration appears to apply a broad brush approach on the (seemingly unfounded) basis that those entering the UK via “*illegal routes*” are for the most part economic migrants rather than asylum seekers.

But it is not clear whether the evidence truly supports the view that those arriving unlawfully have less “*genuine need*” than those arriving via other routes.

To ensure the system is fair and based on a proper assessment of an individual’s need for protection, would the better approach not be to assess that need on its own merit rather than to consider how an individual arrived in the UK?

Fairness is inherently bound to the principle of proportionality, which also applies in relation to

³⁰ New Plan for Immigration, p.4.

³¹ See Heaven Crawley, *Refugee Council: Chance or Choice? Understanding why asylum seekers come to the UK*, January 2010, p. 5, [https://www.refugeecouncil.org.uk/wp-](https://www.refugeecouncil.org.uk/wp-content/uploads/2010/04/Chance-or-choice-2010.pdf)

[content/uploads/2010/04/Chance-or-choice-2010.pdf](https://www.refugeecouncil.org.uk/wp-content/uploads/2010/04/Chance-or-choice-2010.pdf) (accessed on 26 April 2021).

³² Ibid.

³³ Ibid.

³⁴ New Plan for Immigration, p.6.

matters pertaining to refugees.³⁵ This is generally held to mean that measures taken must: (i) have a legitimate objective; (ii) be effective to achieve their objective; (iii) go no further than is necessary (the “*necessity test*”); and (iv) survive the “*balance of interest*” test.

Taken at face value, the objectives of fairness, of supporting those in need, and of disrupting people smuggling networks are of course legitimate.

Yet, on the basis of the discussion above, there are clearly a number of concerns with the measures proposed under the New Plan for Immigration and the extent to which they fulfil the limbs of the proportionality test.

- Is the objective to punish people smugglers, or to reduce the number of refugees to the UK? The measures chosen (criminalizing travelling while being a refugee) does not suggest the former.
- A critical question as to the effectiveness of the proposals is whether measures intended to diminish the protection available to those arriving in the UK via “*illegal routes*” will in fact serve to reduce the frequency of the criminal people smuggling operations that, to a large degree, facilitate such routes.
- A further question in this regard is whether the proposals will sufficiently promote fairness and “*better protect and support those in genuine need of asylum*”,³⁶ considering that many of those arriving “*illegally*” may have “*genuine need*” (and valid reasons for their desire to settle in the UK specifically, such as family ties) but would under the new proposals at best only be eligible for temporary protection status (which, as noted above, is arguably no protection at all).
- With respect to the necessity test, the question is whether there are less restrictive measures that would be equally (or more) effective in achieving the stated objectives. Examples of less intrusive measures could include: increasing development aid and diplomacy to tackle the refugee crisis at source; assisting displaced people who are still in their country of origin; and assisting countries of first arrival such as Jordan, Lebanon, Greece, Italy, Spain (or the relevant international

organisations active there) who run programs to assist refugees from neighbouring countries.

- Finally, the “*balance of interest*” test requires that the rights of (and specific impact of measures on) the individual be weighed against the diffuse general public interest. It is difficult to see how measures that penalise genuine refugees (e.g., denying protection in spite of a “*genuine need*”, or the requirement that an individual with temporary protection status reach destitution before they may be eligible for housing and other public relief, while denying them the right to work) could meet the requirements of this test.

Conclusion

The New Plan for Immigration appears to raise concerns. Clearly, there is a question as to the extent to which the proposals are consistent with the Refugee Convention. Without greater clarity on precisely how the proposals are intended to work, it is difficult to assess the extent of any infringements of international law.

There is a further question as to whether the proposals are in line with the principle of proportionality, including whether they are in fact likely to achieve their stated objectives of increasing fairness within the system and disrupting people smuggling networks. The plan (if implemented) is likely to offend at least the spirit of the Refugee Convention.

...

CLEARY GOTTLIEB

³⁵ See, for example, references to proportionality in UNHCR, *A guide to international refugee protection and building state*

asylum systems, 2017, <https://www.unhcr.org/3d4aba564.pdf> (accessed on 27 April 2021).

³⁶ New Plan for Immigration, Foreword, p.3.